

IN THE SUPREME COURT OF THE UNITED STATES.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

vs.

Jennie M. Mettler, Defendant in Error.

October Term, 1900.

No. 428.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

SUR *MOTION TO DISMISS WRIT OF ERROR.*

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION.

The motion to dismiss the writ of error rests upon two propositions asserted by the defendant in error, viz., (1), that this court has no jurisdiction; and, (2), that the writ of error is frivolous.

The second contention rests upon three subpropositions, viz., (*a.*) The protection of the Fourteenth Amendment of the Constitution of the United States cannot be invoked by the plaintiff in error because, as to the State of Texas, it was a foreign corporation; (*b.*) The plaintiff

in error did business in the State of Texas as a foreign corporation, after the Supreme Court of that State had decided that the statute complained of was constitutional. By reason of this fact it is conclusively bound by such decision. (*c.*) The constitutional question raised has already been decided by this court.

As to the first point.

The Record (page 36) shows that on the trial of the cause, before any evidence had been received, the plaintiff in error, then the defendant, excepted to so much of the plaintiff's petition as claimed attorneys' fees and damages under the statute of Texas; and that this exception was based upon its claim that said statute was in violation of the Fourteenth Amendment to the Constitution of the United States. The exception was in these words:—

> Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorney's fees and statutory damages in this action, because such attorney's fees and damages are asserted and claimed under the Statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said Constitution and provisions of the Constitution of the State of Texas, and therefore void.

The court overruled said exception. This action and the exception taken thereto appear thus stated on the Record:—

> The court then and there overruled said exceptions, to which defendant then and there, to wit, on the twenty-eighth day of May, 1900, excepted.

The Record shows that the constitutional point was thus promptly raised by the pleadings (Record, page 14), and was renewed at the commencement of the trial.

A question therefore as to whether or not a statute of the State of Texas was in violation of the Constitution of the United States, having been properly raised in the course of the proceedings by the claim by the defendant,

and said question having been ruled upon by the Circuit Court of the United States adversely, the right to appeal directly from such ruling, to this court, follows. In view of the very recent decision by this court in Loeb *vs.* Trustees of Columbia Township, 179 U. S., 472, it would be an impertinence to attempt any argument in support of what has been finally decided by this court. In the Loeb case, after referring to previous authorities, this court, through Mr. Justice Harlan, said:—

> It was the purpose of Congress to give opportunity to an unsuccessful litigant to come before this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention to the Constitution of the United States.

As to defendant in error's second proposition.

(*a.*) It is not necessary to consider the right of a foreign corporation to insist upon doing business within the State of Texas, against any statutory direction by said State. True, the plaintiff in error was a foreign corporation, *qua* the State of Texas; but, with the consent of its authorities, it did business, as appears by plaintiff's statement (Record, page 1), in that State through an agent resident therein. Whilst thus doing business, with the State's permission, it entered into a contract. The question raised by the bill is as to its constitutional rights under such contract. There can be no doubt that after a foreign corporation has been permitted to do business, it is entitled to the protection of the Constitution of the United States, within the foreign State in which the same is done, as fully as though it were a citizen of such State. A foreign State may forbid the doing by it of any business therein, but, if it permits such business, it cannot refuse the enjoyment of rights granted by the Constitution of the United States, which prohibits the deprivation of life, liberty or property, without due process of law, and the denial of the equal protection of the law.

In Santa Clara County *vs.* Southern Pacific Railroad,

118, U. S., 394, this court, through Chief Justice Waite, said:—

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the constitution, which forbids a State to deny to any person within its jurisdiction equal protection of the laws, applies to these corporations. We are of opinion that it does.

In Smyth *vs.* Ames, 169 U. S., 466, where the constitutionality of the Act of the State of Nebraska was raised with regard to certain corporations, some of which were foreign corporations, this court, through Mr. Justice Harlan, said:—

> By the Fourteenth Amendment it is provided that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled.

The cases cited by the defendant in error in her motion to dismiss the writ, which conceded the right of a State to prohibit a foreign corporation from doing business within its borders and imposed conditions upon the transaction of such business therein, have no application. Admitted by the State of Texas within its borders and to do business therein, the plainiff in error became entitled to the protection of the Fourteenth Amendment.

(*b.*) Sayles' Statutes of Texas of 1897, Article 745, in substance provides that when foreign corporations obtain permits to do business in Texas they are then entitled to all the rights and provisions of domestic corporations. This article has been construed by the Supreme Court of Texas in S. A. & A. P. Railway *vs.* Southwestern Tel. & Tel. Co., 93 Texas, 322. In that case the court says:—

> Thus the State adopts the foreign corporation under the law and makes it equal to domestic corporations. Nothing could be more comprehensive.

If the statute of Texas be in violation of the Constitution of the United States, no decision of the Supreme Court of Texas can deprive any litigant of a right to the protection of the Constitution, as interpreted by this court.

The defendant in error argues that a condition precedent to the right of the plaintiff in error to do business within the State of Texas after the same had been decided by the Supreme Court to be constitutional was its future acceptance of the Texas statute. All that can be specifically contended for under this head is that the condition precedent, if there was any, was the acceptance of all valid enactments of the State of Texas not in violation of the Constitution of the United States.

It will be observed that the Texas statute is one which does not relate solely to foreign corporations; but is made applicable to all life insurance companies. How, then, can the statute be construed as a condition precedent to the doing of business within the State by foreign insurance companies?

Even though the statute had been made applicable to foreign corporations only, it would have been subject to the Constitution of the United States, so far as it came within the purview of the Fourteenth Amendment.

In Barron *vs.* Burnside, 121 U. S., 186, it was held that the statute of a State requiring a foreign corporation, as a condition of acquiring a license to do business, to agree not remove any action against it into the Federal Courts, was void. This court, through Mr. Justice Blatchford, said:—

> As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of the privilege secured to it by the Constitution and laws of the United States, the statute requiring a permit must be held to be void.

What was said in the last cited case was approved in Southern Pacific Railroad *vs.* Denton, 146 U. S., 202.

(*c.*) It is contended that the Texas statute is not constitutional because it required a certain class of corpora-

tions, life insurance companies, to pay in addition to what was required by their contract a penalty, with interest, of twelve per centum, viz., $5175, and also $2500 as attorneys' fees.

A similar statute in the case of Phœnix Insurance Company *vs.* Hart has recently been decided by the Supreme Court of Georgia to be in violation of the Fourteenth Amendment.

We assume that unless the point raised by the appellee has been heretofore decided adversely by this court, or unless it be of such easy solution as admits no question, this court will prefer to hear it discussed in the usual way, by oral argument with briefs duly submitted. We do not propose therefore, in this brief, to enter into any elaborate argument; but simply to show that the question is at least an open one, not unattended with difficulty.

In Gulf &c., Railway Co. *vs.* Ellis, 165 U. S., 150, this court ruled that a statute of Texas, giving an attorney fee in addition to the amount of the claim, in all cases of suit against railroads for services or for damages, or for overcharges of freight, or for the killing or injury of stock, was unconstitutional.

It is suggested by the defendant in error that this decision has been overruled, or shaken, by the later case of Atchison, &c., R. R. *vs.* Matthews, 174 U. S., 96. This suggestion, however, fails in view of what in this last decision was said by this court referring to the Ellis case: "We see no reason to change the views then expressed."

In the Matthews' case a statute allowing attorneys' fees in suits against railroads, for damages by fire, was sustained; but, solely on the ground that the statute was a police regulation for the purpose of securing such care on the part of railroads as would prevent the escape of fire from moving trains. This court held that the statute then by it considered was not merely one which imposed a penalty for non-payment of a debt.

In the case now before this Court, the statute of Texas, manifestly, is one which imposes upon life insurance com-

panies, a special penalty for non-payment of their debts. In no sense can it be held to be a police regulation.

It is true that the statute of Texas was held constitutional in Merchants' Life Association *vs.* Yoakum, 98 Fed. Rep., 251. It is only necessary, however, to read the opinion delivered by the Circuit Court of Appeals to see that the question is at least a difficult one, deserving of final consideration and determination by this court.

JOHN G. JOHNSON,
J. E. GILBERT,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED
OCT 31 1901
JAMES H. MCKENNEY
Clerk

In the

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 168.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA,

Plaintiff in Error,

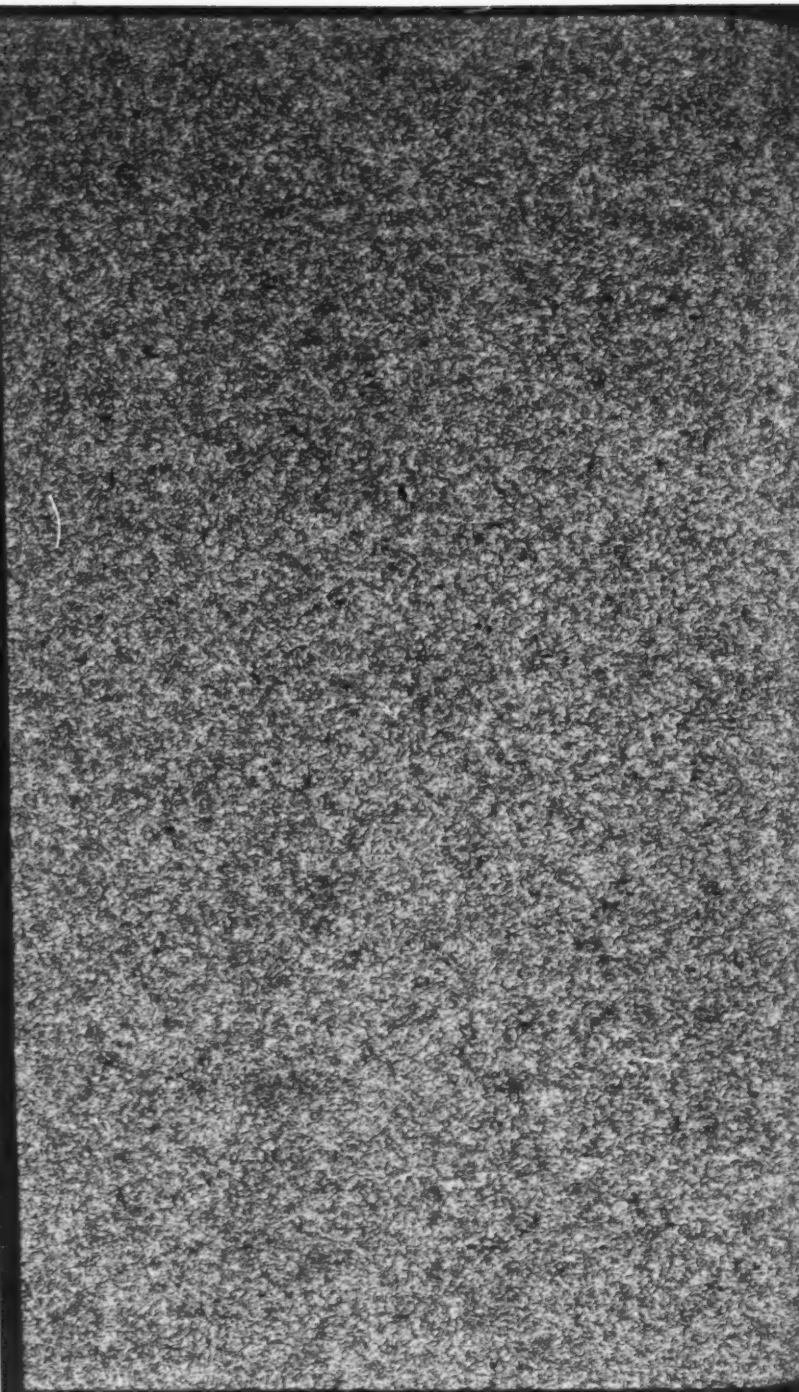
vs.

JENNIE M. METTLER.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR UPON THE CONSTITUTIONAL QUESTION.

By MAURICE E. LOCKE, Dallas, Texas.



Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR, v. JENNIE M. METTLER.	17,913. October Term, 1901. No. 165.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR UPON THE CONSTITUTIONAL QUESTION.

PRELIMINARY STATEMENT.

This case presents the question whether Article 3071 of the Revised Statutes of Texas contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Having upon the docket a later case (No. 265) which involves the same question, and being otherwise deeply interested in it as Texas counsel for several life insurance companies, I have been invited by the plaintiff in error to file an argument in its behalf upon that subject. Its regular counsel will of course do all

that is necessary in the way of showing from the record how the question got into the case. Hence, to avoid a needless repetition, I shall assume that it is properly there, and proceed at once to its discussion.

PROPOSITION.

Article 3071 of the Revised Statutes of Texas is violative of the Constitution of the United States, in that it denies to the defendant the equal protection of the laws; and therefore it is not binding upon the defendant.

ARGUMENT.

The plaintiff in error, hereinafter called the defendant, is a Pennsylvania corporation which has long maintained an agency in Texas, where it was sued and served in the present action. It is a life insurance company, and for the purposes of this argument is assumed to be without the classes exempted from the operation of the statute.

The Statute reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The circuit court of appeals for the fifth circuit has recently held that this article has no application to accident insurance companies; because their business is neither life nor health insurance, but is some-

thing distinct from them both and so recognized by the legislature.

Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389.

By other statutes, subsequently enacted, two general classes of insurance corporations are exempted from the provisions of Article 3071, to-wit: "mutual benefit organizations doing business in this state through lodges or councils", and "mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations."

R. S., 3092 and 3096; Sup. Council Am. Legion of Honor v. Larmour, 81 Texas 71; Mut. Res. Fund Life Assn. v. Payne, 32 S. W. Rep. 1063.

The state and federal courts in Texas and the circuit court of appeals at New Orleans have repeatedly held that Article 3071 is valid, or that at least it is obligatory upon foreign insurance companies doing business in the state. In the present discussion inquiry will therefore be made, first as to whether the statute is valid upon its own merits, and then as to whether if not so it is nevertheless binding upon foreign corporations.

1.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant dis-

tinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; Magoun v. Ill. Tr. & Sav. Bank, 170 U. S. 283; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

It can not be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress" (Mr. Justice Bradley in Missouri v. Lewis, 101 U. S. 22). Our first inquiry must therefore be answered in the negative, unless there is some real distinction between the obligation of a life or health insurance company to pay its "loss" and the obligation of persons and corporations generally to pay their debts. Furthermore, it must be answered in the negative unless in some way the duty to pay their respective "losses" rests differently upon life and health insurance companies which are without the two excepted classes, and upon accident insurance companies, individual underwriters, and life and health insurance companies within the excepted classes.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31.

But if it were otherwise, it would be very difficult to point out a satisfactory reason why the duty to pay a life or health insurance claim was more imperative than the duty to pay other debts. The supreme court of Texas never has attempted to do so, though the question has been before it several times. In its first and leading case of Union Cent. Life Ins. Co. v. Chowning, 86 Texas 654, that court rested its decision upon the right of the states to classify persons, and said nothing about the merits of this particular classification. In Fidelity and Casualty Co. v. Allibone, 90 Texas 660, the court merely stated that the question was distinguishable from that involved in the Ellis case. Upon every other occasion, it has been content to deny a writ of error without delivering an opinion, or, without discussing the question, to render a judgment including the penalties. The courts of civil appeals have usually treated the question as closed for them by the decisions of the supreme court. Hence it is that the three below mentioned are the only cases in which any court has attempted to justify the discriminations of the statute.

> New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Orlopp, 61 S. W. Rep. 336.

In the Smith case, the majority held, in an able opinion based upon the decision of this court in the Ellis case, that the statute was invalid; and in a dissenting opinion the first effort was made to defend the classification. The argument there put forth is that the law is a legitimate exercise of the police power; that whenever the legislature finds a business carried on by corporations to be detrimental to the

interests of the people, it may discriminate against that business and deal with it in any manner that wisdom or caprice may suggest; and that "the policy of the state seems to be to hamper, discourage, embarrass, and retard" what is known as the old-line life insurance business. The dissenting justice found sufficient reason for this policy in the fact that certain companies had accumulated very large assets, and in the course of about fifteen years of business in Texas had collected there some twenty million dollars of premiums and paid only about five and a half million dollars of losses; and that the receipts and disbursements of other companies were in like ratio. I can not bring myself to believe that such an argument requires serious refutation in this court.

In the Yoakum case, the circuit court of appeals attributes to the legislature a wholly different purpose in the enactment of this law. It mentions and illustrates the fact that Texas has no statute requiring that warranties shall be construed as mere representations, and none forbidding physicians to testify about disclosures made to them in their professional capacity. It speaks of the length and cost of some litigations, and of the inequality between the position of a skilfully managed corporation and that of an unlettered peasant. From such a line of reasoning, the court deduces the conclusion that "the obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance," and that the classification involved "is therefore not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies." But the legislature did not declare such a purpose, and the law is not an appropriate means of accomplishing it. Certainly it has no bearing on the question

of whether communications to physicians shall be privileged, and no tendency to make less stubborn a litigation once begun. It does not equalize the business ability of the corporation and the peasant; but rather it stimulates the search of corporation counsel for defenses that can be relied upon to defeat unjust claims, regardless of their relation or lack of relation to the actual grounds for declining payment. The fact that Texas has not followed the example of other states in enacting laws of the character indicated, shows that it is not her policy to so curtail the freedom of contract and of judicial investigation. The law can not properly be vindicated as tending very remotely to accomplish a purpose which the state repudiates. It is worthy of note, too, that the circuit court of appeals appears to have changed its opinion as to the purpose of the law. In Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389, it says: "There is little doubt that the statute in question, imposing penalties upon life and health insurance companies which are so combative as to contend for their supposed rights under written contracts containing resolutory and suspensive conditions, and based on warranties, in the courts of the state of Texas, when the right to so contest is denied to no other class of suitors, is penal in its character."

The decision of the court in the Orlopp case was announced by the same justice who had a few years before dissented in the Smith case, and added nothing of importance to the literature of the subject. But the remarkable fact that in the face of numerous adjudications by the appellate courts of the state to the contrary, the district judge in that case ruled that the law was unconstitutional, and placed "an unreasonable and unconscionable penalty on an in-

surance company for daring to avail itself of the privilege of litigating its rights," shows how deep-rooted is the feeling of the bench and bar that those adjudications are wrong.

In the opinion of the majority in the Smith case the object of the statute was said to be "to compel such insurance companies to pay their debts for a death claim within the time provided by the policy"; and in the Walden case (26 S. W. Rep. 1012) its object was said to be "to prevent vexatious delays in the payment of death losses." Aside from the fact that these statements omit all reference to health and endowment insurance, they are manifestly correct; and upon them the law ought to stand or fall. The legislature did not stop to speculate as to whether insurance companies would exercise more care in writing their policies if the courthouse doors were shut against them.

The attempt has been made (British Am. Ass. Co. v. Bradford, 60 Kansas 82) to sustain similar legislation upon the ground that the business of insurance is one clothed with a public interest, and so subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the public interest. So, valued policy laws may be justified as tending to prevent reckless insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the commonweal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty

shall not annul the insurance, laws requiring that notice shall be given of accruing premiums,—all these deal with features of the insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts, insurance companies do not differ from other natural or artificial persons, and therefore in this regard they ought not to be classed by themselves. When a lawful contract has been made, the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

The state of Nebraska has a statute, almost verbatim the same as that of Kansas, allowing attorney's fees, to be taxed as costs, in judgments rendered against insurance companies upon policies of fire, tornado or lightning insurance on real property. The supreme court of Nebraska, in considering that law, said in substance that fire insurance companies were notoriously litigious and prone to contest claims upon frivolous pretexts; and that therefore such legislation was justifiable (Lancashire Ins. Co. v. Bush, 82 N. W. Rep. 313). Occasionally one hears a like argument urged in support of the Texas statute. But, in the first place, this argument rests upon a false premise. Life insurance companies have probably less litigation in proportion to the volume of their transactions than any other business institutions. And the percentage of such litigation in which the exempted accident and assessment companies figure is unreasonably large. During the years 1883 to 1899 inclusive, the three leading life insurance com-

panies transacted in Texas a business of over $246,000,000. Volumes 60 to 93 of the reports of the supreme court of Texas show that during the same seventeen years these companies had in that court seven suits relating to losses, in five of which their positions were sustained by the court. Volumes 110 to 178 of the reports of this court show that during the same period they had thirteen cases here, in eleven of which their contentions were approved by the court. I do not know to what incomprehensible figures their totals mounted in the meantime; but at the end of 1899 they had outstanding more than a million policies aggregating more than three billion dollars. In the second place, the statute imposes its penalties indiscriminately upon all the companies therein described, without any regard to their individual character for contentiousness or to the nature of their conduct in particular suits pending. Thus companies ordinarily very compliant are punished for resisting in the best of faith what they suppose to be wrongful demands upon their treasuries. Nor are all litigious people so dealt with, but only a few arbitrarily selected. It is as if the legislature had commanded that all red-haired men (to whom tradition ascribes more than their due share of combativeness) should pay damages and attorney's fees when defeated in their law suits. If litigiousness were a proper basis for classification, all plaintiffs and defendants manifesting such a disposition should be included, and no others. But litigiousness is not a proper basis for classification. It is the boast of all free governments that within their domains the rights of the citizen are secure. He who contends in court for his supposed rights does no wrong; but often he renders to society its highest service at an infinite sacrifice of

his own convenience. Submissiveness was not the spirit that animated the Boston tea party, or the embattled farmers of Lexington who "fired the shot heard round the world." When it becomes the prevailing spirit, we shall have reached that point in our national history "where wealth accumulates and men decay."

It might be supposed that the law was intended to compel the payment of death claims without litigation, because the evidence of the assured would not be available in their support. But it covers sick-benefits and endowments as well as death losses. The plaintiff in life insurance cases always has a great advantage over the defendant because of his more intimate knowledge of the personal history of the assured; and no legislation is needed in this behalf. Moreover, no penalty is imposed upon those who litigate other causes of action with the representatives of deceased persons. The law can not be sustained as devised for the protection of widows and orphans; because it inures to the benefit of administrators, assignees, creditors, and all other holders of death, sick-benefit and endowment claims. If it were argued that life and health insurance policies were intended to provide cash assets for times of emergency, the sufficient answer would be that policies of fire, marine, storm, and accident insurance partake equally of this character, while bank deposits have it to a much greater degree. Yet all these may be contested without incurring any penalty.

It is the duty of every person to pay his rightful debts; but it is not the duty of any one to pay an unjust claim made upon him. On the contrary, as Prof. von Ihering has well demonstrated in his book on The Struggle for Law, we all owe to the commu-

nity the obligation of resisting such demands. This court decided a few years ago upon high grounds of public morals, that a life insurance company could not even by an express promise bind itself to pay to a man's personal representatives a policy matured by his deliberate suicide (Ritter v. Mutual Life Ins. Co., 169 U. S. 139). Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date (Bunyon on Life Assurance, 115). Fraud and self-destruction would be wofully multiplied by such encouragement. Yet this partial and unequal statute goes very far towards driving all life and health insurance companies away from the courts, and making their policies virtually incontestable. For no matter how fully convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from jurymen whom the law tells that it is an unworthy suitor.

The parties to such a contest do not enter it upon equal terms. A sum ranging anywhere from twenty-two per cent. to thirty-five per cent. of the amount in controversy is given to the plaintiff as a prize and exacted from the defendant as a penalty if the plaintiff wins; but if the defendant wins it gets no prize, and the plaintiff pays no penalty.

In the Ellis case, the question was whether a statute allowing to the plaintiff an attorney's fee of $10 was valid. The court held that it was not; but three justices dissented upon the ground that attorney's fees might be allowed as costs. The law now under consideration gives to the plaintiff not only an attorney's fee in such sum as the jury may fix ($2,500 in this case), but in addition thereto twelve per cent. of the policy as punitory damages.

But even if it were possible to distinguish life and health insurance losses from other debts, surely there exists no legitimate ground for the discrimination which this statute makes among those who sustain such losses.

In the first place, the operation of the law is confined to corporations; individual insurers are not affected by it. Individual life underwriting is of course unusual; but it is neither impossible nor unprecedented (Lord v. Dall, 12 Mass. 115). The debts being of the same character, why is the duty of a corporation to pay any more imperative than that of an individual?

In the second place, "mutual benefit organizations doing business in this state through lodges or councils" are exempt from these penalties. The court can take judicial notice of the generally understood fact that there are but few stock companies engaged in writing life insurance in this country. Of the seven largest American companies, only one has any capital stock, the other six being mutual; and the corporate name of the defendant shows that it is of that description. These companies are "mutual benefit organizations." The purpose of their existence is to obtain for their members the benefits of life insurance at actual cost, and not to earn profits for shareholders. The only difference between them and those exempted is that they do not transact their business through lodges or councils. What conceivable relevancy has this distinction to the matter of debt-paying? They are alike in the circumstance that they are corporations issuing life insurance policies and charging premiums therefor. They are competitors in business. Yet in contesting doubtful claims, one risks only the ordinary costs and ex-

penses of litigation, while the other hazards in addition to them the heavy penalties named in this law.

In the third place, "mutual relief associations * * * which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members," are exempt. The only distinction between these associations and other mutual life insurance companies, is that they get their funds from after-death assessments while the others get theirs from advance premiums. This difference may well affect the question as to what is a reasonable time after the death of the assured within which to make the claim mature; but it can not have any proper bearing upon the duty of the respective corporations to pay their debts when they become due.

In the fourth place, according to the decision of the circuit court of appeals, accident insurance companies are not included in either class of corporations named in the statute, and therefore are exempt from its penalties. What possible basis can there be for such a discrimination? The case at bar illustrates its injustice and lack of reason. The plaintiff's claim was that the assured was accidentally drowned in the Pecos River. The defendant's claim was that he was not dead, but that he had fraudulently disappeared; and the circumstances were such as to justify it in litigating the question. Suppose that in addition to the $15,000 of policies sued on, he had had a like amount of accident insurance. If the facts were as claimed by the plaintiff, both this defendant and the accident insurance company would be liable; but if they were as claimed by the defendant, neither would be liable. If both companies contested the matter, and made a common defense, and the two causes were consolidated, so that there should be absolutely

no difference between the plaintiff's just demands against the two; yet upon an adverse verdict, judgment would go against the accident in urance company only for its policies, interest and costs, while this defendant would have to pay these items and more than $4000 of penalties in addition.

It has sometimes been suggested that the legislature meant to impose the penalties upon corporations organized for purposes of profit, and to exempt those of benevolent aim. But this could not have been the legislative intent, even if such a difference would warrant the classification. As above mentioned, it is known of all men that most of the old-line life insurance business of America is done by mutual companies not organized for profit; yet these are subjected to the penalties. It is perhaps equally well known that in this country nearly all the accident insurance is underwritten by stock companies created for the profit of their shareholders; yet these are exempt from the penalties.

The authorities were so thoroughly considered by this court in the Ellis and Matthews cases that any general review of them here would be out of place. The later decisions have contributed little to the discussion. With only a few exceptions they have been founded upon the Ellis case, not merely in recognition of its binding force but with hearty approval of its reasoning. So far as I have observed, no court has yet had occasion to adopt the distinction drawn by Mr. Justice Brewer in the Matthews case. It could have been, but was not, applied to the facts of Paddock v. Mo. Pac. Ry. Co., 155 Mo. 524. In that case the supreme court of Missouri held unconstitutional a statute allowing attorney's fees to plaintiffs in actions to recover damages for in-

juries to stock occurring in consequence of the failure of a railway company to fence its track as required by law. But this distinction has no bearing upon the present controversy, which is governed by the general principles announced in the Ellis case and reiterated in the Matthews case. The supreme court of Colorado, in Davidson v. Jennings, 60 Pac. Rep. 354, and a little earlier the supreme court of Alabama, in Randolph v. Builders' and Painters' Supply Co., 106 Ala. 501, held unconstitutional statutes allowing attorney's fees to the successful plaintiffs in suits to enforce mechanic's liens. In Johnson v. Goodyear Min. Co., 127 Cal. 4, the supreme court of California held invalid a statute giving to employes of corporations liens and attorney's fees in suits to enforce the same.

Article 8012 of the Revised Statutes of Missouri (of 1899) reads as follows: "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss, and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." The court will notice that this statute is less objectionable than the one now under examination. It applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay. Yet it has been held unconstitutional in Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31. The opinion of Judge Phillips is interesting and cogent, especially that part of it, cover-

ing several pages, in which he refutes the proposition that the enforcement of insurance contracts may come within the police power. Quoting from State v. Greer, 78 Mo. 188, he says that the police power is a system of precaution "'for the prevention of crimes or of calamities,' and police regulations 'are such provisions of the law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property. And the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such condition, as would be detrimental to the community, and on no other grounds.'" He adds that "The business of insurance is not immoral. It spreads no contagious disease. It does not affect the public health. It does not obstruct the public policy of the state, nor threaten the community with any public calamity or danger."

Section 2140 of the Georgia Civil Code provides that if any insurance company refuse to pay a loss within sixty days after demand, it shall be liable, in addition to the loss, for not more than twenty-five per cent. of its amount and all reasonable attorney's fees; provided it shall be made to appear that the company's refusal of payment was made in bad faith. This statute, like that of Missouri and radically unlike that of Texas, makes no discrimination among insurance companies of different kinds, and punishes them only when they are found to have acted in bad faith. But the supreme court of Georgia, in a recent decision, quoting from numerous authorities and citing the Ellis case as conclusive, held it to be violative of the equal protection clause of the Fourteenth Amendment (Phenix Ins. Co. v. Hart, 112 Ga. 765).

From the foregoing considerations it seems clear to me that the Texas statute denies the equal protection of the laws to life and health insurance companies not exempt from its provisions.

2

Our second inquiry is whether, if the statute be violative of the constitution, it is nevertheless binding upon foreign corporations as a condition of their right to do business in Texas. It has been so held in some cases.

Mutual Life Ins. Co. v. Walden, 26 S. W. Rep. 1012; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; *contra*, the majority opinion.

The argument is, that Texas had power to condition in whatever way she chose the defendant's right to transact business within her territory; that the statute was enacted before the policy was issued; and that, therefore, by entering the state and issuing the policy the defendant agreed to be bound by the statute.

The defendant is a life insurance company domiciled in Pennsylvania, and had no inherent right to do business in Texas. The latter state could exclude it, or could admit it upon conditions; and for the present it will be assumed that her power to impose express conditions was unlimited.

Article 745 of the Revised Statutes as amended by chapter 119 of the General Laws of 1897 provides a method whereby a foreign corporation may obtain a permit to do business in Texas, and that "such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the

laws of this state on corporations organized under the laws of this state." In S. A. & A. P. Ry. Co. v. S. W. Tel. & Tel. Co., 93 Texas 313, p. 322, the supreme court says of this provision: "Thus the state adopts the foreign corporation upon the terms stated in the law and makes it equal to domestic corporations." While this article does not apply directly to the admission of foreign insurance companies, it shows what is the general policy of the state in dealing with non-resident corporations admitted within its limits.

Article 3071 itself does not distinguish between foreign corporations and those of domestic origin. They stand upon exactly the same plane. As originally enacted (Sec. 9, Ch. 145, General Laws of 1874), it applied only to life insurance companies incorporated elsewhere than in Texas. It was changed to its present form in 1879, becoming Article 2953 of the Revised Statutes of that year; and thus it was made applicable to health insurance companies as well as life, and to domestic corporations as well as foreign.

The terms prescribed for the admission of life and health insurance companies doing business otherwise than upon the assessment plan are found in Articles 3062-3069 of the Revised Statutes. The payment of damages and attorney's fees to persons obtaining judgments against them is not one of the conditions there specified. Article 3071, requiring such payment, is simply a part of the general statutes; and it has no force as a condition binding upon the defendant other than such as it derives from that fact. It is one of twenty articles, 3070-3089, relating to general features of the insurance business. To illustrate, 3070 is a venue law; 3072 provides for the revocation of the license of any life or health company which

fails to satisfy an execution against it within thirty days; 3073 prohibits the issuance of life policies by companies engaged in fire, marine or other insurance business; 3075 limits the amount which fire, marine and inland insurance companies may expose to loss in single risks; 3076 limits their right to own real estate; 3077-3081 provide a remedy for the impairment of the capital of domestic companies; 3083-3085 require annual statements; 3087-3088 regulate the payment of dividends; and 3089 is a valued policy law. Most of these articles relate to all companies doing business in Texas, without reference to their domicile.

By Articles 3048-3049 it is made the duty of the insurance commissioner to issue a certificate authorizing any insurance company to do business in Texas, when satisfied that it has complied with the law and that it has the requisite financial strength. The company is not required to make any promise about paying attorney's fees and damages; and obviously it would have no occasion either to pay them or to become liable for their payment until after it had been admitted to the state and begun to transact business.

Nor have the Texas courts bound this court by an interpretation of the article as one of the terms of admission of foreign companies to the state. The supreme court never has held it to be so, having placed its decisions upon the ground that the law is valid. The court of civil appeals for the second district held in the Walden case, by a bald assumption without reasons given, that Article 3071 was found among the prescribed conditions upon which life insurance companies might do business in Texas, and that a foreign corporation was not in position to complain of these requirements. Afterwards, in the

Smith case, that court discussed and overruled the Walden case, and held that the article was not one of the conditions upon which foreign corporations were admitted, and that it was like any other statute—binding if valid. Probably the Orlopp case (61 S. W. Rep. 336) should be construed as a return by that court to its original doctrine. All the other courts of civil appeals have simply followed the decisions of the supreme court that the law is valid. The five courts of civil appeals in Texas are intermediate courts, whose rulings and interpretations are not authoritative.

Of course foreign corporations entering Texas for the transaction of business thereby subject themselves to her laws. But to draw from this familiar doctrine the conclusion that Article 3071 is binding upon them is a sheer begging of the question. If the article is unconstitutional, it is not law; but is only a fruitless attempt of the legislature to do something which was beyond its power. Suppose that when the defendant entered Texas there had been upon the statute rolls, or in the state constitution, some other article, of superior authority and entirely inconsistent with Article 3071; would any one say that it was bound by 3071, and not at liberty to point out in court the inconsistency of the two? In the words of Chief Justice Taney, "The Constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union, and is the paramount law" (Prigg v. Pennsylvania, 16 Peters 539, p. 628). The Fourteenth Amendment is a part of the law of Texas; and the defendant is claiming here only the right to show that it is inconsistent with Article 3071.

So far as my observation has extended, never, except in these Texas cases, has it been suggested

that a corporation left behind it the protection of the Constitution when it crossed the borders of the state of its origin. At the suit of a New York corporation, the supreme court of Georgia held unconstitutional a statute resembling that now under consideration; and the circuit court in Missouri did the like for an English corporation. The Kansas and Nebraska decisions hereinbefore referred to as sustaining similar legislation do not rest upon any such ground, though the corporations involved were British. In both the leading cases wherein the Texas supreme court declared the law to be valid upon its own merits, the litigating companies were foreign. This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law or of their right to remove causes to the federal courts.

> C., M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418; St. L. & S. F. Ry. Co. v. Gill, 156 U. S. 649; Smyth v. Ames, 169 U. S. 466; Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186.

The equal protection clause of the Fourteenth Amendment, by its plain terms, extends to all persons who are within the jurisdiction of the state, and not to those only whose homes are there. That corporations are persons within the meaning of this clause has long been settled.

The case of Fire Association of Philadelphia v. New York, 119 U. S. 110, lends no support to the doctrine that foreign corporations are bound by all the statutes of a state without regard to their constitutionality. The logic of that case seems to me to be this. The Fire Association was a Pennsylvania

corporation, which first entered New York in 1872. At that time there was upon the statute books of New York a law requiring that all insurance companies of other states doing business in New York should pay to it the same tax (when higher than the regular New York rate) which New York insurance companies were required to pay in such states. In 1873 Pennsylvania enacted that every foreign insurance company report each January the amount of premiums received by it in Pennsylvania during the preceding calendar year, and pay a tax of three per cent. thereon as a condition of its right to continue business in the state. The Pennsylvania tax rate of three per cent. therefore became engrafted upon the New York law in 1873. The Fire Association did business in New York by virtue of annual licenses. At the beginning of each fiscal year it occupied the position of a foreign corporation seeking admission to the state for that year. Each time the state met it at the threshold with the proposition that it would be admitted upon condition that it pay into the state treasury three per cent. of its premiums collected in New York, a condition to which there is no constitutional objection. It seems to have accepted the proposition from year to year, and to have paid its tax accordingly. But in 1882 it refused to pay the tax on the premiums of 1881; and to collect this tax the action was brought. When it applied for and accepted its license to do business in New York for the year 1881 (or perhaps 1882), it impliedly agreed to pay the tax; and the court held that it should do so. There was here no room for the operation of the Fourteenth Amendment. It was a lawful contract between the state and the company. The state said to the company, which was then as to this particular

matter a person without its jurisdiction, that in consideration of the payment of a certain sum of money, it would admit the company within its boundaries for one year; and the company accepted the offer. The present case is very different. Here the court is asked to decide that when the defendant has been admitted to the state, and under its license has transacted business with its citizens, and controversies have grown out of such transactions, the state may deny to the defendant the equal protection of the laws in the settlement of those controversies.

The case at bar is wholly unlike that of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. When the Oil Company entered Texas, the state had a law forbidding certain combinations in restraint of trade, and providing that foreign corporations violating the same should be prohibited and enjoined from doing business there. Obviously, this made abstinence from such combinations an express condition of the right of the Oil Company to transact business in Texas; and the suit was brought to enjoin it from continuing business, on the ground that the condition had been violated. The court held that no question of discriminations was presented by such a record. The situation was somewhat analogous to that found in Doyle v. Continental Ins. Co., 94 U. S. 535. There it was held that although the state of Wisconsin could not prevent a foreign corporation from removing causes to the federal courts, it could lawfully revoke the license of one which had done so.

This case is likewise plainly distinguishable from that of New York Life Ins. Co. v. Cravens, 178 U. S. 389. There it appeared that the legislature of Missouri had enacted that no life insurance policy upon which two annual premiums had been paid should be

forfeited for non-payment of premiums; and that in case of lapse, such a policy should be commuted for paid-up insurance. The general validity of the statute was not questioned. The Insurance Company's contention was, that as this was an interstate contract, the parties thereto could elect to be bound by the laws of either state; that they had chosen to contract under the laws of New York; and that the judgment of the supreme court of Missouri to the effect that they could not do this had deprived it of its freedom of contract without due process of law. In other words, the Insurance Company contended that because it was a foreign corporation, it could do business in Missouri and claim for such business an exemption from the valid laws of that state. The court held that such a claim was without foundation. But in the case at bar, the defendant admits that as to its Texas business it is bound by the laws of Texas; and it only claims the right to test in the appropriate tribunals the question as to whether a certain provision is really one of those laws.

So far in this argument it has been assumed that the state of Texas had unlimited power to name express conditions upon which alone the defendant should be admitted within its borders. But in fact it had not the power to impose conditions "repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 Howard 404; Home Ins. Co. v. Morse, 20 Wallace 445; Bar-

ron v. Burnside, 121 U. S. 186; Blake v. McClung, 172 U. S. 239.

The controlling principle seems to be that when for reasons of public policy an important right is guaranteed to a person by the constitution or laws of the United States, he can not either expressly or by implication bind himself to waive that right. His agreement to do so is invalid, because the interest of the nation forbids it. As was said by Mr. Justice Hunt in Home Ins. Co. v. Morse: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

Whatever force there is in the argument that the penalty statute was imposed by the state as a condition of the defendant's right of entry, is derived from the agreement to waive its constitutional guaranty of equal protection thought to be involved in its acceptance of the state's license. For if the effect of the statute is to deny the equal protection of the laws to the defendant while within the jurisdiction of the state, then, considered as a law, the statute is null and void; and it can act, if at all, only as evidence of the terms of an implied contract between the state and the defendant.

So important is the right of access to the courts, that one can not bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him; or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

Home Ins. Co. v. Morse, 20 Wallace 445; Pope Mfg. Co. v. Gormully, 144 U. S. 224; Thomp-

son v. Charnock, 8 Term Rep. 139; Rowe v. Williams, 97 Mass. 163; Del. and Hud. Canal Co. v. Pa. Coal Co., 50 N. Y. 250.

The right to the equal protection of the laws is one guaranteed by the Constitution of the United States; and the essence of that right is the privilege of appealing on equal terms to the courts for protection against unjust demands. It is a right vastly more important to the individual and to the public than that of removing causes from state tribunals to federal. All the reasons which have impelled this court to hold of no effect an express agreement to waive the privilege of removing causes, apply with double force to the proposition that an implied agreement to waive the right of equal protection is nugatory. In this connection I beg to quote from Mr. Justice Harlan's dissenting opinion in Fire Assn. of Philadelphia v. New York, 119 U. S. 110. The court thought his language inapplicable to the facts of that case, but to this discussion it appears exceedingly appropriate. "Can it be," he asks, "that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a state which has enacted a statute denying such protection to it and to like corporations from the same state? Is the right to that protection any less valuable or fundamental than the right to remove a suit into the courts of the Union for trial? Will it be held that an express agreement by a corporation not to exercise the latter right is void and not enforcible, but that a local statute denying the equal protection of the laws to a corporation will be upheld, simply because that corporation came within the jurisdiction of the state which assumed to make such denial, and received

from her officers, acting in conformity with her laws, a certificate of its right to transact business there? Will effect be given in one case to what (erroneously, I think) is called an implied agreement to surrender a constitutional right, while an express agreement in the other to surrender a constitutional right is held to be invalid?"

In the first part of this brief I endeavored to show that the statutory classification was arbitrary and unconstitutional. If it be so, the case appears to me to come fairly within the principle of Home Ins. Co. v. Morse and Barron v. Burnside. In that event, the requirement of the statute would not have bound the defendant even if it had been made one of the express terms of admission. *A fortiori*, it does not bind as a general statute not made an express condition of the defendant's right to enter Texas.

Respectfully submitted,

MAURICE E. LOCKE,

Counsel.

No. 165. Of October Term, 1901.

FILED
JAN 30 1902
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Jan. 30, 1902.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

vs.

Jennie M. Mettler, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

[Record No. 17,913.]

BRIEF FOR PLAINTIFF IN ERROR.

T. ELLIOTT PATTERSON,
J. E. GILBERT,
JOHN G. JOHNSON,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

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October Term, 1901.

No. 165.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

William A. Hunter was a resident of Reeves County, in the State of Texas. On or about the thirty-first day of October, 1896, the plaintiff in error, the Fidelity Mutual Life Association of Philadelphia, through its agent in Texas, delivered to said Hunter in the State of Texas, three policies of insurance upon his life, each stipulating for the payment of $5000 in case of his death. He paid at the time of the delivery of each of said policies the sum of thirty-two dollars and fifty-five cents, and agreed to pay a like sum semi-annually thereafter upon each policy on the twenty-eighth day of the months of April

and October for a period of ten years from 28th October, 1896.

Each policy (Record, page 37) was stated to be "made "in consideration of the written application of the above-"named insured, which is made a part hereof, a copy of "which is hereto attached."

The application, of which a copy was attached to each policy (Record, page 42), stated, *inter alia*:—

> "*Fourth.*—That my present occupation is real es-"tate and farming, prior was bookkeeping. If more "than one occupation, give all and be specific."

In this application, a copy of which was thus attached, dated 28th October, 1896, Hunter, over his signature (Record, page 44) said:—

> "I hereby agree and bind myself as follows: That "the truthfulness of the statements above made or "contained, by whomsoever written, are material to "the risk, and are the sole basis of the contract with "the said association."

Certain provisions were made part of the policy (Record, page 37), which were entitled:—

> "Privileges and Provisions Referred to in the Body "of this Policy as Conditions Precedent."

Amongst these appears the following:—

> "*First.*—Application. The application, copy of "which is given on third page of this policy, forms "the sole basis of this contract, and it is hereby made "the duty of the insured hereunder to review the "copy of said application and to report promptly to "the president of the said association any misstate-"ments, errors or omissions."

Each policy was made payable to Hunter's sister, Jennie M. Mettler, a widow.

It appeared that Hunter left his sister's house in Pecos, Tex., on the third day of December, 1896, announcing

his intention to go to Mentone, in Loving County, for the purpose of making proof of a section of land in that county alleged to belong to him which he had occupied for three years.

He left in a team, consisting of a wagon and two horses, with some provisions, camping utensils, a gun and camping outfit. He expected to be absent a week or ten days, intending at a later period, after having returned from Mentone, to go back to that place.

Shortly before leaving, he handed to Mr. R. D. Gage, a lawyer, a package of papers sealed in a large envelope, which he asked Mr. Gage to put in a vault. This package contained the policies of insurance.

The sister testified that she did not know the policies had been taken out in her name. There was evidence in contradiction of this averred ignorance.

The sister waited for about fifteen days after the brother's departure, and then, not hearing anything of him, as she swore, caused a searching party to be formed.

This party followed the trail of the wagon and found the same, abandoned, near the banks of the Pecos River, some twenty miles distant from the point of departure at Pecos. One of the horses was found dead. The other was found many miles away, at a later date. There was evidence that some cooking had been done at the place where the wagon had stopped; that some buckets had been filled with water; and that Hunter had slept under a tarpaulin there found.

Foot-tracks, partly identified as those of Hunter, were found, indicating that he had gone to and from the river for water, probably, and also for a supply of brush, the remains of a fire having been found near the wagon. There was also some testimony of foot-tracks near the edge of the river, of an indication of a slipping of one of the feet, and of a broken mesquite root in the bank.

There was a great deal of conflicting testimony as to whether or not there were quicksands in the river; as to its depth; and as to whether or not it was dangerous.

There was testimony offered by the defendant to the

effect that two witnesses, some time after the alleged death, had seen a person alive, identified as Hunter, by photographs.

There was contradictory testimony as to the occupation of Hunter at the time the policies were issued.

Suit was brought upon the policies by the sister, in one of the State courts of Texas, which was removed on the ground of citizenship, by the insurance company, to the United States Circuit Court.

The trial resulted in a verdict for the plaintiff; and although the constitutionality of the Texas statute inflicting penalties was questioned by the defendant, the learned trial judge instructed the jury that it was constitutional, and directed them to add to the amount of their verdict a penalty of twelve per cent. and reasonable counsels' fees.

The jury returned a verdict on the 2d of June, 1900, in favor of the plaintiff (Record, page 19), in these words:—

"DALLAS, TEXAS, June 2nd, 1900.

"We, the Jury, find for the plaintiff and assess her "damages as follows: $15,000 as principal; $2,250 "as interest at rate of 6% from Dec. 2nd, 1897, to "June 2nd, 1900; $5,175, the same being 12% dam- "ages on the amount of $15,000 and interest thereon "at 6%; $2,500 as reasonable attorneys' fees."

The plaintiff remitted, during the term, the sum of $3375 of said $5175 damages, leaving $1800 as part of the twelve per cent. damages and $2500 as "reasonable" attorneys' fees. Judgment was entered for the amount of the policies, with interest, and for the additional sum of $4300.

During the course of the trial, exceptions were taken to the admission of certain evidence which will be referred to more particularly in the argument. Exceptions, also, were taken to the charge of the court in certain respects and to its refusal of certain points presented by the defendant.

The constitutionality of the Texas statute authorizing the collection of the attorneys' fees and of the penalty of twelve per cent. was contested in the pleadings and at the trial. The learned trial judge was specifically asked to declare the same unconstitutional. He held, however, that it was constitutional, and he directed the jury to find for the plaintiff an additional amount, which would include the twelve per cent. and reasonable attorneys' fees, if they should find in favor of the plaintiff.

An appeal was taken to this court, from the Circuit Court of Texas, because of the fact that a constitutional question was involved. The case being therefore upon appeal in this court, all errors in the court below are here reviewable.

ARGUMENT.

We will discuss four propositions:—

I. THE STATUTE OF TEXAS, WHICH DIRECTS THAT LIFE AND HEALTH INSURANCE COMPANIES, WHO SHALL DEFAULT IN PAYMENT OF THEIR POLICIES, SHALL PAY TWELVE PER CENT. DAMAGES, TOGETHER WITH REASONABLE ATTORNEY'S FEES, IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT ERRED IN ADMITTING THE TESTIMONY OF A REPUTE IN THE FAMILY OF HUNTER CONCERNING HIS DEATH AND THE MANNER THEREOF.

III. THE COURT ERRED IN NOT CHARGING, AS REQUESTED, THAT IF HUNTER AT THE TIME OF MAKING APPLICATION FOR INSURANCE WAS NOT A FARMER AND REAL ESTATE AGENT, THERE COULD BE NO RECOVERY.

IV. THE COURT ERRED IN NOT CHARGING THE JURY TO FIND A VERDICT IN FAVOR OF THE DEFENDANT BECAUSE OF THE FAILURE TO OFFER SUFFICIENT EVIDENCE FROM WHICH AN INFERENCE OF HUNTER'S DEATH COULD BE DRAWN.

I. The statute of Texas, which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent. damages, together with reasonable attorney's fees, is in violation of the Constitution of the United States.

The statute of Texas reads thus (Record, page 30):—

> "In all cases where a loss occurs and the life or "health insurance company liable therefor shall fail "to pay the same within the time specified in the "policy after demand made therefor, such company "shall be liable to pay the holder of such policy, in "addition to the amount of the loss, twelve per cent. "damages on the amount of such loss, together with "all reasonable attorney's fees for the prosecution "and collection of such loss."

This statute puts upon certain kinds of insurance companies which insist upon their constitutional right of appeal to courts of justice, a huge financial imposition in the way of penalty and of payment of large fees.

In the present case, an insurance company defended a claim for $15,000, because of death, alleged to have occurred within thirty-five days of the payment of a premium of $100. No mutual life insurance company, in the slightest degree regardful of its duty to its members, could have paid, voluntarily, the amount demanded. All the circumstances pointed to a plot to obtain a large insurance after a disappearance, rather than after an actual death.

We submit that there is no possible ground upon which, in accordance with the Constitution of the United States, life and health insurance companies can be mulcted in large penalties if they demand a judicial determination of their liability to pay the amounts of their policies, whilst all other kinds of insurance companies and all other corporations and individuals, may, without penalty, obtain such determination. There is no reasonable ground for

any classification justifying the penalties imposed by the Texas statute, upon certain kinds of insurance companies.

It is idle to urge that the plaintiff in error, a foreign corporation, agreed as a condition to permission to it to do business in Texas, that it would accept liability for the penalties imposed by the statute. If the law we are considering is constitutional, it affects alike domestic and foreign corporations. No condition was imposed upon the plaintiff in error, or accepted by it, obliging a specific acknowledgment of its validity. The plaintiff in error was permitted to do business in the State of Texas. The business by it there transacted, thus permitted, gave to it rights and subjected it to duties, the extent of which must be ascertained by valid laws.

We submit that the decision of this court in Gulf Ry. Co. *vs.* Ellis, 165 U. S., 150, is conclusive of the question here submitted, and that there is nothing in Atchison R. R. *vs.* Matthews, 174 U. S., 96, which diminishes the applicability of the Ellis case.

In the Matthews case, the statute allowing attorney's fees in suits against railroads for damages by fire, was sustained on the ground that it was a police regulation for the purpose of securing such care on the part of the railroads as would prevent the escape of fire from moving trains.

In the present case, the penalties are imposed whenever insurance companies of a certain class demand that the extent and fact of their liability under a contract, the legality of which is conceded, shall be determined in the ordinary course of judicial procedure, by judicial tribunals.

What proper police regulation can there be such as will put a penalty, not imposed upon litigants generally, upon certain litigants because they ask for a trial?

The question involved under this head has been discussed in the brief, now part of the records, filed in opposition to the motion to dismiss the writ of error. We rest the argument of the same upon the briefs heretofore filed.

II. The court erred in admitting the testimony of a repute in the family of Hunter, concerning his death and the manner thereof.

The plaintiff, the sister of Hunter (Record, page 48), under objection which was overruled, and under exception, was permitted to answer this question:—

> "Q. State what is the general reputation in the "family—your father, brothers and sisters—as to "the death of your brother, W. A. Hunter?"

Her answer was:—

> "My father, brothers and sisters all believed my "brother to be dead."

Under like objection overruled, and under exception taken, the same witness was permitted to testify (Record, page 49):—

> "That the family believed he was drowned in the "Pecos River out in the West, and that this family "belief has existed ever since I wrote them about it."

The letter to which the witness referred was one she recognized as having been written by herself, addressed to her father, dated December 30th, 1896, written, she thought, after she had returned from the camp where her brother's outfit had been found.

The depositions of various members of the family, seven in all, including the father, sisters and brothers, were taken at Homer, Ohio, where they resided.

They testified that Hunter had lived at Homer until he went to Texas, about 1885, and that after that time, a family correspondence had been kept up regularly, until the time of his disappearance.

These witnesses (Record, page 56), under objection, overruled and under exceptions taken, were permitted to answer the following question:—

> "Q. If you know, state what is the general repu- "tation and repute in the family as to whether said

"William A. Hunter is dead or alive? How do know "the general repute in the family as to whether he "is dead or alive? If you know, what is the general "repute in the family as to what has become of said "William A. Hunter? As to the 'family' who do you "mean?"

Their answer was:—

"That the general repute in the family is that "William A. Hunter, Jr., is dead. He is supposed "by the family to have drowned in the Pecos River; "that is the general belief. By the 'family' is meant "the father and the brothers and sisters of William "A. Hunter, Jr."

In a suit brought by one of the family, the sister, to recover $15,000 of insurance upon the life of a brother, the fact of death, entitling to the money, being the sole issue, the family were permitted to testify to a repute not only as to his death, but as to his death by drowning in the Pecos River. One of the "family" who testified to this repute, was the plaintiff. The rest of the "family," who thus testified, were persons who do not appear to have seen the alleged dead brother for eleven years, nor to have had any communication with him saving by correspondence, nor to have known anything about him excepting that he had ceased to correspond with them, after they had been informed by a letter from the plaintiff, of facts connected with his disappearance. Is it possible to establish the fact of a death by "repute in a family," especially in a family situated as was that of Hunter, where such repute enures directly to the family benefit?

Was Hunter alive or dead? This was an issue of fact. The opinion concerning the same, entertained by persons who knew nothing as to the fact; who had no opportunity of arriving at a correct determination thereof, but who were interested in its establishment, was utterly immaterial. It did not, in the slightest degree, conduce to a correct determination of the issue.

The authorities condemn, without exception, the admissibility of evidence such as was received in this case.

In the Texas courts, the question we are considering has been decided adversely to such admissibility.

In Johns *vs.* Northcutt, 49 Texas, 444, decided in 1878, which was an action to try title to land, one of the plaintiffs, who was a member of the family, was permitted to testify, over objection and exception, that, by correspondence with certain other living members of the family, named by him, he had heard and believed that certain other parties named by him were heirs, &c. On appeal this was held to be error, the court saying (page 455):—

> "The testimony here in question is undeniably "merely hearsay. Such evidence is, of course, in "general inadmissible. Appellees insist, however, "that hearsay is admissible to prove pedigree; but "still it must be admitted this character of testimony "is not generally admissible, even for this purpose. "But still its admissibility for the proof of pedigree is "restricted and limited to the hearsay or declarations "of a particular character of persons, or such as are "made and testified to under special and particular "circumstances. The testimony objected to, plainly, "upon its face, does not come within the exceptions "to the general rule, that hearsay evidence is not "admissible."

In Schwarzhoff *vs.* Necker, decided in 1880 by the Texas Commission of Appeals, reported in 1 Unreported Cases, 325, which was an action to assert title to land against one Julius Harms, in which the daughter of his divorced wife intervened to claim an interest alleged to have vested in her by reason of the death of her mother, the issue was as to the admissibility of certain evidence offered to prove the mother's death. The syllabus correctly summarizes the point decided as follows:—

"Testimony of witnesses, one that 'the last I heard
" 'of Mrs. Harms was during the war, after the di-
" 'vorce. I understood that she lived with a man
" 'named Eisemann in 1863 or 1864 in Galveston.
" 'There was a report that she was dead, but I can-
" 'not say anything about her. I think I heard the
" 'report of her death several years ago;' another
"that 'The last I heard of Mrs. Harms was during
" 'the late War.' 'I never heard of Mrs. Harms after
" 'she left old Mr. Harms; that is, since eighteen
" 'or twenty years;' and another (Julius Harms) that
" 'I have heard nothing from my former wife since
" 'the divorce. Anna Necker (the intervenor) told
" 'me her mother was dead; that a report of her
" 'death reached her; that she died not long since.
" 'I never inquired as to my former wife in Galves-
" 'ton;' is insufficient to prove the death of a party."

In Hurlburt's Estate, decided by the Supreme Court of Vermont in 1896, reported in 35 Atl. Rep., 77, the syllabus reads:—

"1. 'General reputation in the family,' which is "admissible in matters of pedigree, or to establish "the facts of birth, marriage or death, is confined "to declarations of deceased members of the family, "and family history and traditions handed down by "declarations of deceased members, in either case "made *ante litem motam*, and originating with per-"sons presumed to have competent knowledge of the "facts stated; and evidence of the opinion or belief "of the living members of a family as to the death of "another member is not within the rule, and is in-"admissible.

"2. A person's death cannot be established by "general reputation among his living friends and "acquaintances."

The opinion in this case considers most elaborately the decisions and the reasoning involved in the subject.

In Haines *vs.* Guthrie, decided by the Court of Appeals in 1884, reported in 13 Q. B. Div., 818 (L. R., 1883-1884), the syllabus reads:—

> "The rule which admits hearsay evidence in pedi-
> "gree cases is confined to the proof of pedigree, and
> "does not apply to proof of the facts which consti-
> "tute a pedigree, such as birth, death and marriage,
> "when they have to be proved for other purposes.
> "Therefore, in an action for goods sold, to which
> "the defense was infancy, an affidavit stating the date
> "of the decedent's birth, which had been made by
> "his deceased father in an action to which the plain-
> "tiff was not a party, was held inadmissible as evi-
> "dence of the age of the defendant in support of his
> "defense."

The case of Scott *vs.* Ratliffe, 5 Peters, 84, was one of pedigree. Testimony was there given by a witness to the effect that some twenty years earlier, at a certain place, she had been told of a certain death. All this occurred long before the fact of death became important to the people who spoke of the death. It has no bearing upon the present question. In connection with this decision, that of Stein *vs.* Bowman, 13 Peters, 209, which speaks of the danger of offering proof of declarations after a controversy had arisen, should be read.

In Whittuck *vs.* Waters, 19 English Common Law Reports, 561 (4 Carr. & Payne, 375), the syllabus reads:—

> "In an action for use and occupation by the re-
> "versioner, against a person who had been tenant
> "for years, determinable on three lives; a register
> "of burials of a Wesleyan chapel, is not admissible
> "to prove the death of one of the *cestuis que vie;*
> "nor is the evidence of a witness who heard in the
> "family that another of the *cestuis que vie* was dead.
> "*Semble*, that a copy of an inscription on a tombstone
> "in the burial ground of a Wesleyan chapel is also
> "not evidence for this purpose."

In the present case, suit was brought within a year of the alleged death. The testimony of the witnesses was taken in about two years thereafter. It was not possible to establish a "repute." The alleged "repute" was simply an opinion concerning a fact which could only be found by a jury—an opinion which, so far as it did not rest upon evidence, was without foundation. The family believed, without knowledge of anything else than that he had not written to them for several years and had disappeared, under circumstances stated to them by the sister, that he was dead. Grant that the jury might, from the evidence, reach a conclusion of death, would their conclusion be helped by evidence that certain persons had reached a similar conclusion, from similar facts? What special ability to pass upon the fact of death, existed in the "family"?

III. The court erred in not charging as requested, that if Hunter, at the time of making application for insurance, was not a farmer and real estate agent, there could be no recovery.

The learned trial judge refused to charge (Record, pages 32, 118) as requested by appellant, in these words:—

> "A warranty is a stipulation in writing in the "policy thereon indorsed, on the truth of fulfillment "of which the entire contract depends. Such stipu- "lation may be on the face, margin or back of the "policy, and whether it be material to the risk is not "a question for the jury to consider. Therefore, the "jury must believe from the evidence that W. A. "Hunter, Jr., at the time of making application for "insurance to defendant, on which policies of insur- "ance were issued and are herein involved, was at the "time he made such application both a farmer and "real estate agent, and unless you so believe you will "find for the defendant."

The defendant proved that Hunter was practically without occupation, settled habitation or residence; that long prior to his disappearance he had forfeited, by his failure to pay the first installment of interest on the purchase price, the entry which he had made on the public domain; and that (Record, page 82) his last occupation, prior to its application, was in the employment of a photographer.

The jury, under the evidence, might, therefore, fairly have found that at the time of his application his occupation was not real estate and farming. The defendant was entitled to an instruction to the effect that if such was not his occupation, the application was false and there could be no recovery. Such instruction was asked for and was refused.

It does not appear that there is any special statute in Texas upon the subject of representations or warranties or the effect thereof.

In the present case, as we have seen, the insured stipulated that the statements in the application were material to the risk, were the sole basis of the contract, and were true. He further agreed that the application, of which a copy was attached to the contract, formed the sole basis of the contract. The policy itself, in the body thereof, stated it was made in consideration of the written application which was a part thereof, a copy being attached.

The plaintiff sought to bring the contract under the Pennsylvania law. In view of the fact that it was delivered by a Texas agent, in the State of Texas, to Hunter, we contend it was made under the Texas law; but we are quite ready to concede the contention of the plaintiff, that it was made under the law of Pennsylvania.

In Lutz *vs.* The Metropolitan Life Insurance Company, 186 Penna., 527, the syllabus reads:—

> "In an action upon a life insurance policy where "the undisputed evidence is that the insured in his "application had falsely stated that he never had any "illness, and had not consulted a physician, it is error

"for the court to submit the question of the materi-
"ality of the answers in the application to the jury.
"Where it is doubtful whether the matter is material,
"the question of materiality must be submitted to
"the jury, but where the answer is false and the mat-
"ter involved is palpably and manifestly material to
"the risk, as in answers as to health, the Act of June
"23d, 1885, P. L., 134, has no application."

In Smith *vs.* Northwestern Mutual Life Insurance Company, 196 Penna., 314, the syllabus reads:—

"No principle of law will enable a party who guar-
"antees a fact upon which a contract for insurance
"is based, which fact is afterwards found not to ex-
"ist, to enforce the contract. He agrees to answer
"for the truth of the fact, and cannot escape on the
"ground of his mistake as to its existence.

"Where an applicant for life insurance warrants
"that his answers shall be true, full and fair, and in
"answer to a question states that he had not since
"childhood had the disease or disorder of 'spitting
" 'or raising of blood,' while the uncontradicted evi-
"dence was that he had spit blood, was frightened
"and had consulted a physician about it, the answer
"being, if not untrue, not full and fair, and, being
"material to the risk, avoided the policy, and in an
"action upon it the trial judge committed no error
"in giving binding instructions for the insurance com-
"pany."

In New York Life Insurance Co. *vs.* Fletcher, 117 U. S., 519, the syllabus reads:—

"If an applicant for life insurance is required to
"answer questions relating to material facts in writ-
"ing and to subscribe his name thereto as part of
"the application upon which the policy is issued, it
"is his duty to read the answers before signing them,
"and it will be presumed that he did read them.

"If a policy for life insurance on which premiums

"have been paid is void by reason of untrue repre-
"sentations as to material facts in the application,
"made without design on the part of the applicant,
"the only recovery which can be had on the policy
"after the assured's death is for the premiums paid
"on it."

In Hubbard *vs.* Mutual Reserve Fund Life Association, decided in 1900 by the Circuit Court of Appeals of the First Circuit, 100 Fed. Rep., 719, the syllabus reads:—

"Where an application for life insurance recites
"that the answers and statements in this application
" 'are warranted to be full, complete and true,' and
"that if they are not so, the policy issued thereon
" 'shall be null and void,' and also stipulates that
"the answers which it contains are parts of the
"policy, the policy and the application together con-
"stitute the written agreement of insurance, and both
"the insured and the beneficiary under the policy are
"bound by the warranty of the answers and state-
"ments in the application, although some of the ques-
"tions and answers are of such a character as to
"preclude the idea that the parties intended to make
"them the subject of warranty."

This court, in Ætna Life Insurance Co. *vs.* France *et al.*, 91 U. S., 510, held:—

"Where a party, in order to effect an insurance
"upon his life, agreed that if the proposal, answers
"and declaration made by him—which he declared
"to be true, and which were made part and parcel
"of the policy, the basis of the contract, and upon
"the faith of which the agreement was entered into—
"should be found in any respect untrue or fraud-
"ulent, then, and in such case, the policy should be
"null and void—*held*, that the company was not liable
"if the statements made by the insured were not true.

"The agreement of the parties that the statements
"were absolutely true, and that their falsity in any

"respect should void the policy, removes the ques-
"tion of their materiality from the consideration of
"the court or jury."

In Jeffries *vs.* Life Insurance Company, 22 Wallace, 47, the syllabus reads:—

"Where a policy of life insurance contains the fol-
"lowing conditions, to wit:—

" 'This policy is issued by the company, and ac-
" 'cepted by the assured, on the following *express*
" '*conditions and agreements, which are a part of the*
" '*contract of insurance*:—

" '*First.*—That the statements and declaration
" 'made in the application for said policy, and on the
" 'faith of which it is issued, *are in all respects true,*
" 'and without the suppression of any fact relating
" 'to the health or circumstances of the insured *affect-*
" '*ing the interest of the company.*'

"And the further condition:—

" 'That in case of the violation of the foregoing
" 'condition, * * * this policy shall become *null*
" '*and void.*'

"Any answer untrue in fact, and known by the ap-
"plicant for insurance to be so, voids the policy,
"irrespective of the question of the materiality of the
"answer given, to the risk."

In Kansas Mutual Life Insurance Company *vs.* Pinson, decided by the Supreme Court of Texas in 1901, 63 S. W. Rep., 531, the decedent, on applying for the life insurance policy on which the suit was brought, signed an application in which was the following:—

"I also agree that all the foregoing statements
"and answers, as well as those that I make, or shall
"make, to the company's medical examiner, in con-
"tinuation of the application, are by me warranted
"to be true, and are offered to the company as a con-
"sideration of this contract."

In his answers on his medical examination he stated he had five living sisters, aged respectively fifty-two, fifty,

forty-seven, forty-five and thirty-six years, and signed at the foot of it the following:—

> "I hereby certify that I have read the foregoing, "and my answers to the questions and statements "are true and correctly recorded."

The policy recited that it was issued:—

> "In consideration of the statements and agree- "ments in the application for this insurance which "are made a part of this contract, and in further con- "sideration of the payment of premiums."

The sisters were in fact aged only forty-nine, forty-six, forty-four, thirty-six and thirty-three years, respectively.

The case was certified from the Court of Civil Appeals upon a question whether this discrepancy of age forfeited the policy.

The Supreme Court held that the provisions recited constituted a warranty, and that (quoting Goddard *vs.* Insurance Co., 67 Tex., 71):—

> "If they did, the law exacts a compliance with their "terms, according to their true intent and meaning, "whether material or not, or whether known to the "assured or not, if he had the opportunity, and it "was his duty, under the circumstances, to acquaint "himself with them."

The court accordingly answered the question certified that this discrepancy did cause a forfeiture of the policy.

IV. The court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn.

We might not find it necessary to deny, in the case of a man having no motive to disappear, that a jury might be allowed to find the fact of his death from a long-con-

tinued disappearance, under circumstances tending to establish the fact of imminent peril at a prior time.

In the present case, however, policies of insurance were taken out by a person with no visible means of support, which obliged him to pay $200 per annum. These policies were made payable to a sister, who did not appear to be dependent upon him. Within about thirty-five days after their delivery to him, he disappeared. There was a very apparent motive for the disappearance; for, if, without actual death, it would be accepted as an equivalent therefor, his sister, possibly he, would profit to the extent of $15,000.

The error in the proceedings in the court below consisted in the trial judge allowing the jury, despite the obvious motive to disappear, to infer death from the fact of disappearance, without calling their attention to the fact that it was quite as likely to have resulted from a desire to obtain the insurance money, as from actual death.

Would the circumstances connected with the camping at the river, the abandonment of the camp and the footmarks, have been sufficient to establish death?

If not, did the continued subsequent non-appearance for several years, where there was a motive not to appear, supply any corroborative evidence?

Undoubtedly there had been an abandonment of the camp. If Hunter desired to disappear, there would have been such abandonment. The footmarks near the river, what was supposed to be an indication that a foot had slipped, and a broken mesquite root, were utterly inadequate to establish the fact of drowning, above all in a river as shallow as was the Pecos.

If Hunter had entered into a plot to collect from the defendant, through an insurance upon his life, the sum of $15,000, by disappearing, he would have done precisely what was done in the present case.

In no way were the jury warned of the danger of drawing a wrong inference from the facts presented because

of the existence of a motive to give a false presentation and color.

All the points presented to the learned trial judge by the defendant tending to elicit such warning were refused.

He was asked (Record, page 33) to charge:—

> "If you believe from the evidence that William A. "Hunter, Jr., has been seen or heard from, by any "one, at any time since his disappearance, you will "find for the defendant."

This point was refused because, as he told the jury, he had covered the same in his general charge. Testimony had been given by two witnesses, Wallace and Littler, that each had seen Hunter, identified by photographs, alive, after the alleged disappearance, one at one place and the other at another, far distant. In the general charge the learned trial judge said (Record, page 117):—

> "The evidence of witnesses is also before you tend- "ing to show that William A. Hunter has been seen "on two occasions and at two places since the date "of his alleged disappearance on December 4th, "1896. You should carefully consider this evidence "in relation to his having been seen since the date "of his alleged disappearance, and if you believe from "the evidence that he was seen by the witnesses who "have testified to this, then, of course, it would be "your duty to find for the defendant."

There can be no doubt that the defendant was entitled to an affirmance of its point, viz., that if Hunter had been seen or heard from by any one, the verdict should be in its favor. The only justification of a refusal of the point was that it had been charged, in substance, at least, elsewhere.

In the general charge, however, the jury had been instructed that they should find for the defendant, only if they believed he had been seen by the witnesses who had testified to that fact. Two witnesses having so tes-

tified, they were practically told that if they believed one had seen him and the other had not, their verdict should not be for the defendant.

The learned judge also refused (Record, pages 34, 118) another point in these words:—

> "The fact that it is possible or probable that the "absent party was at a time and place subsequent "to and different from that at which he was last "seen in a place where an accident might have be- "fallen him, will not authorize or warrant the indul- "gence in a presumption concerning his death. The "law requires greater certainty and more satisfactory "evidence of death. Therefore, unless the jury be- "lieve from the evidence that William A. Hunter, Jr., "when last seen was in a position of peril, such as "that it is more probable that he then and there "lost his life than that he extricated himself from "such perilous position alive, you must find for the "defendant."

Was not the defendant entitled to have the jury told it was not sufficient to ground a presumption of death, to show that the absent party had been last seen at a place where an accident might have befallen him, but that the law required greater certainty and more satisfactory evidence, of death?

If, where last seen, Hunter was in a position of peril such as made it more probable that he had extricated himself than that he had lost his life, there was no presumption he then and there died. The jury ought to have been told, that under such circumstances, they should not draw such a presumption.

Again. The learned trial judge (Record, pages 34, 117) was asked to charge:—

> "The law presumes that the life of any person "continues for seven years after the last time he was "seen alive or heard from. The death of a person "may be established by circumstantial evidence, but

"in such cases the circumstances proven must ex-
"clude, to a reasonable and moral certainty, the fact
"that such person is still living, and each fact in the
"chain of facts from which the death of the party is
"to be inferred must be proved by competent evi-
"dence and by the same weight and force of evi-
"dence as if each one were the main fact in issue,
"and all the facts proven must be consistent with
"each other and consistent with the main facts in
"issue—that is, the death of the party. Unless, there-
"fore, the plaintiff has established the death of Will-
"iam A. Hunter, Jr., by the certainty hereinbefore
"set forth, the jury should find for the defendant."

Was not the defendant entitled to demand proof of circumstances such as excluded a reasonable and moral certainty that Hunter was still living?

If shown, when last heard from, to have been in a position of peril not such as to exclude a reasonable and moral doubt that the peril resulted in his death, was the fact of his death established?

The learned trial judge (Record, pages 32, 117) charged thus:—

"If from the evidence in this case you should come
"to the conclusion that Hunter has been continu-
"ously absent since December 3d, 1896, without be-
"ing heard from by his relatives and friends, it should
"have due weight with you in arriving at your ver-
"dict. * * * Absence alone cannot establish the
"death of Hunter, for the law presumes an individ-
"ual shown to be alive and in health at the time of
"his disappearance continues to live. While the
"death of Hunter is not to be presumed from ab-
"sence alone, yet it is a circumstance which should
"be taken into consideration with all the other evi-
"dence in the case and the conclusion of life or death
"arrived at from all the facts and circumstances, in-
"cluding his continued absence."

We submit that this portion of the charge was inadequate, because it failed to call the attention of the jury to the fact that a motive existed for Hunter's continued absence. The non-appearance of a person having no motive to disappear, may lend corroboration to circumstances tending to prove a prior death. Such non-appearance, however, where there is such motive, affords no corroboration whatever of anything other than of a desire to materialize the motive into money.

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For Plaintiff in Error.